Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

WILLIE L. GLENN (as Personal Representative of the Estate of Lester Zachary), and KAREN ZACHARY (Individually, and As Next Friend of Lester Zachary),
Petitioners,

v.

CITY OF COLUMBUS, GEORGIA/CONSOLIDATED GOVERNMENT OF COLUMBUS, GEORGIA, RICHARD BOREN (Individually, and In his Official Capacity as Chief of Police), GARY A. BOLEN (Individually, and In his Official Capacity), KENNETH HUDSON (Individually, and In his Official Capacity), JOSEPH COATS (Individually), Gregory Touchberry (Individually), and JOHN DOE (1-3),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BOBBY C. ANIEKWU
GEORGIA STATE BAR NO. 019840
Counsel of Record
BOBBY C. ANIEKWU & ASSOCIATES
127 PEACHTREE STREET, N.E.
SUITE 410 - THE CANDLER BUILDING
ATLANTA, GA 30303
Bobby.Aniekwu@att.net
(404) 885-1717

Attorney for Petitioners

July 19, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Eleventh Circuit reversed the district court's denial of qualified immunity to four police officers Kenneth Hudson, Gregory Touchberry, Joseph Coats and Gary A. Bolen, on Petitioners' Section 1983 individual capacity excessive force claims against the police officers. The Petitioners' decedent Lester Zachary, was shot by CPD officers on his chest and center mass spleen area while standing on the front porch of his home, with beanbag munition rounds that were deployed from close quarters and, died in a local hospital two days later from his sustained wounds. In denying qualified immunity to the officers, the district court found that genuine issues of material fact existed as to whether Hudson, Coats and Touchberry had arguable probable cause to use deadly force against Zachary; that the law at the time of the shooting clearly established that deadly force is not permitted unless the officers have probable cause to use deadly force; that there is a causal connection between Bolen's training of Coats and Zachary's injury because, there is a fact question as to whether Coats targeted Zachary's spleen or center mass even though deadly force was not warranted.

On interlocutory appeal by the officers on qualified immunity grounds, the Eleventh Circuit Court of Appeals Panel concluded that "[O]n April 4, 2005, there were no cases in the relevant jurisdictions on the use of less than deadly force (here a beanbag munition) to subdue a suspect who had threatened to shoot at officers who were in front of his house, spoke about killing children, and threatened suicide." The Panel opined that "as for the case law, 'we look to the precedent of the Supreme Court of the United States,

this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances,'" and concluded that "there was no clearly established law at the time that would have put officer Coats and Sergeants Hudson and Touchberry on notice that the use of a beanbag munition in these circumstances violated the Fourth Amendment."

The Eleventh Circuit Panel further held that the beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and that "[T]he case law from the relevant jurisdictions teaches us nothing about safe distances for shooting a beanbag gun," and thereby, granted qualified immunity to officer Bolen. In so holding, the Eleventh Circuit's decision directly conflicts with the binding precedents of this Court, and the holdings of the Sixth, Ninth and Tenth Circuits, and accords only with the Fourth Circuit. Furthermore, in holding that the use of beanbag in this case did not constitute deadly force, the Eleventh Circuit improperly exceeded its interlocutory appellate jurisdiction which was limited, with regard to qualified immunity issue, to consideration of only questions of law, and not to make its own factual findings.

Three questions are presented:

(1). Whether the Eleventh Circuit Court of Appeals misconstrued the nature and/or scope of precedents that should be considered to determine the existence of "clearly established" law in light of this Court's holding in ***Pearson v. Callahan, 129 S.Ct. 808 , 822-23, 172 L.***

Ed. 2d 565 (2009), by limiting itself to consideration of only United States Supreme Court, Eleventh Circuit and, the host state's supreme court decisions, and thereby conflicts with the Sixth, Seventh, Ninth and Tenth Circuits which hold that the body of case law from out of circuit federal courts and supreme court decisions should be considered as well in determining existence of clearly established right or law.

(2). Where the district court made factual findings that the officers' shooting of Zachary with a beanbag constitutes application of deadly force, did the Eleventh Circuit exceed its interlocutory appeal jurisdiction by setting aside the district court's factual findings and holding that the beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and thereby conflicts with the Fifth, Sixth and Seventh Circuits which hold that such district court factual finding is beyond the circuit court's jurisdiction to review.

(3). Whether the Fourth Amendment law against warrantless searches, arrests/seizures and, ***Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 369 (1980)*** are violated when, officers coerce a suspect to come outside his home under threat of immediate force only to shoot and arrest the suspect, without a warning, warrant, exigent circumstances, or consent, when the suspect steps outside on his porch in obedience to the police officers' command.

LIST OF PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES x

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Background Facts and Issues 3

II. The District Court Decision 6

III. Decision of the Eleventh Circuit Court of Appeals 7

REASONS FOR GRANTING THE WRIT OF CERTIORARI 8

I. THE CIRCUITS ARE SPLIT 10

A. The Eleventh Circuit (In the Present Case) and the Fourth Circuit have held that in determining whether a

constitutional right was Clearly Established at the time of the claimed violation, Courts need not look beyond the decisions of the Supreme Court of United States, their own court of appeals, and the highest court of the state in which the case arose 11

B. In Conflict, the Ninth, Seventh and Third Circuits have held that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of the state courts, other circuits, and district courts, and even unpublished decisions of district courts may inform the circuit's qualified immunity analysis 12

C. The Sixth and Tenth Circuit Courts of Appeal have held that in order for the law to be clearly established, there must be a Supreme Court of United States or, its own Circuit decision on point, and in limited circumstances, on decisions of other circuits 14

II. THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT WITH REGARD TO THE SCOPE AND NATURE OF PRECEDENTS TO CONSIDER IN DETERMINING WHETHER A RIGHT OR LAW IS CLEARLY ESTABLISHED 17

A. Supreme Court Precedent Directs Courts to Consider Out of Circuit Cases in Determining Clearly Established Law . 17

B. The Law was Clearly Established on April 4, 2005 that, shooting a Compliant, Unarmed Mentally Disturbed Suspected Felon who was neither Fleeing nor Resisting Arrest and, did not Threaten the Police Officers in any manner, was an unreasonable search and seizure and violated Fourth Amendment law 21

III. THE ELEVENTH CIRCUIT'S DECISION IS INTERNALLY INCONSISTENT, FAILS TO FOLLOW ITS OWN PRECEDENT AND CONFLICTS WITH THE FIFTH, SIXTH, AND SEVENTH CIRCUITS' DECISIONS, WHICH HOLD THAT THE QUESTION OF WHETHER THE BEANBAG ROUND CONSTITUTES DEADLY FORCE IS A FACTUAL FINDING RESERVED TO THE DISTRICT COURT AND, THE CIRCUIT COURTS ARE WITHOUT JURISDICTION TO REVIEW TRIAL COURT FACTUAL FINDINGS 26

A. The Eleventh Circuit Panel's Decision is Either Internally Inconsistent or Fails to Present Grounds for Reversal and, Conflicts with its Own Precedent 26

B. The Eleventh Circuit Decision Exceeded Its Jurisdiction and Improperly Usurped the District Court's Factual Finding Role,

and Conflicts with the Fifth, Sixth, and Seventh Circuits 29

IV. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT IN *PAYTON* AND, THE SIXTH, NINTH, TENTH CIRCUITS AND A DISTRICT COURT AS REGARDS WHETHER THE FOURTH AMENDMENT LAW AGAINST WARRANTLESS ARRESTS/SEIZURES IS VIOLATED WHEN, OFFICERS COERCE A SUSPECT TO COME OUTSIDE HIS HOME UNDER THREAT OF IMMEDIATE FORCE, ONLY TO SHOOT AND ARREST THE SUSPECT WITHOUT ANY WARNING AND WITHOUT A WARRANT WHEN THE SUSPECT STEPS OUTSIDE ONTO HIS FRONT PORCH IN OBEDIENCE TO THE OFFICER'S COMMAND, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES 33

CONCLUSION 36

APPENDIX:

Appendix A: Eleventh Circuit Opinion (Apr. 20, 2010) 1a

Appendix B: District Court Order re summary judgment on the basis of qualified immunity (Dec. 2, 2008) 18a

Appendix C: District Court Order re summary judgment on remaining claims (June 23, 2010) 66a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Metiva,
31 F.3d 375 (6th Cir. 1994) 31

Anderson v. Creighton,
483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 18

Capoeman v. Reed,
754 F.2d 1512 (9th Cir. 1985) 10

Courson v. McMillian,
939 F.2d 1479 (11th Cir. 1991) 10, 11, 21

Deorle v. Rutherford,
272 F.3d 1272 (9th Cir. 2001), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2660, 153 L.Ed.2d 835 (2002) . . . . . *passim*

Duffy v. Ward,
483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987) 10

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999) 11

Estate of Escobedo v. Bender,
No. 08-2365 (7th Cir. Apr. 5, 2010) 13

Fernandez v. Cooper City,
207 F.Supp.2d 1371 (S.D.Fla. 2002) 16

Flores v. City of Palacios,
381 F.3d 391 (5th Cir. 2004) 31

Garramone v. Romo,
94 F.3d 1446 (10th Cir. 1996) 15

Greason v. Kemp,
891 F.2d 829 (11th Cir. 1990) 11, 21

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 30, 31

Hale v. Townley,
45 F.3d 914 (5th Cir. 1995) 31

Hamilton v. Cannon,
80 F.3d 1525 (11th Cir. 1996) 21

Harlow v. Fitzgerald,
457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396
(1982) 8, 17, 22

Hernandez v. City of Miami,
302 F. Supp. 2d 1373 (S.D.Fla. Feb. 13, 2004),
affirmed without opinion, 204 U.S. App. LEXIS
28318 (11th Cir. Oct. 19, 2004) 27, 28

Jacobs v. City of Chicago,
215 F.3d 758 (7th Cir. 2000) 13

Katz v. United States,
389 U.S. 347, 88 S.Ct. 507, 514, 19 L.Ed.2d 576
(1967) 33

Kopf v. Wing,
942 F.2d 265 (4th Cir. 1991) 25

Kuha v. City of Minnetonka,
365 F.3d 590 (8th Cir. 2004) 25

Lattany v. Four Unknown U.S. Marshals,
845 F.Supp. 262 (E.D. Pa. 1994) 14

Lundgren v. McDaniel,
814 F.2d 600 (11th Cir. 1987) 8, 26, 27, 28

Malik v. Brown,
71 F.3d 724 (9th Cir. 1995) 12

Marsh v. Butler County,
268 F.3d 1014 (11th Cir. 2001) (en banc) 21

McClish v. Nugent,
483 F.3d 1231 (11th Cir. 2007) 21

Meadours v. Ermel,
483 F.3d 417 (5th Cir. 2007) 30

Medina v. City and County of Denver,
960 F.2d 1493 (10th Cir. 1992) 15

Mercado v. City of Orlando,
407 F.3d 1152 (11th Cir. 2005) 16

Naylor v. State of La., Dep't of Corrections,
123 F.3d 855 (5th Cir. 1997) 31

Ohio Civil Service Employees Association v. Seiter,
858 F.2d 1171 (6th Cir.1988) 10

Omdahl v. Lindholm,
170 F.3d 730 (7th Cir. 1999) 25, 32

Otero v. Woods,
316 F.Supp.2d 612 (S.D. Ohio 2004) 25

Payton v. New York,
445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 369 (1980) 9, 33, 34, 35

Pearson v. Callahan,
129 S.Ct. 808,
172 L. Ed. 2d 565 (2009) 8, 9, 18, 20

Pierce v. Ohio Dept. of Rehabilitation and Corr.,
284 F.Supp.2d 811 (N.D. Ohio, 2003) 15

Robinson v. Bibb,
840 F.2d 349 (6th Cir. 1988) 10

Sorrels v. McKee,
290 F.3d 965 (9th Cir. 2002) 13

State v. Henry,
133 N.J. 104, 627 A.2d 125 (1993) 19

State v. Johnston,
184 Wis. 2d 794, 518 N.W.2d 759 (1994) 19

Tennessee v. Garner,
471 U.S. 1 (1985) 8, 17, 21, 22, 25

United States v. Al-Azzawy,
784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct.2255, 90 L. Ed. 2d 700 (1986) 34

United States v. Bramble,
103 F.3d 1475 (9th Cir. 1996) 19

United States v. Diaz,
814 F.2d 454 (7th Cir.), *cert. denied*, 484 U.S. 857, 108 S. Ct. 166, 98 L. Ed. 2d 120 (1987) . . 19

United States v. Edmondson,
791 F.2d 1512 (11th Cir. 1986) 34

United States v. Maez,
872 F.2d 1444 (10th Cir. 1989) 34

United States v. McCool,
526 F. Supp. 1206 (M.D. Tenn. 1981) 35

United States v. Morgan,
743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 . . . . . 34, 35

United States v. Paul,
808 F.2d 645 (1986) 20

United States v. Pollard,
215 F.3d 643 (6th Cir.), *cert. denied*, 531 U.S. 999, 121 S. Ct. 498, 148 L. Ed. 2d 469 (2000) . 19

United States v. Yoon,
398 F.3d 802, *cert. denied*, 546 U.S. 977, 126 S. Ct. 548, 163 L. Ed. 2d 460 (2005) 20

Vathekan v. Prince George's County,
154 F.3d 173 (4th Cir. 1998) 25

Vinyard v. Wilson,
311 F.3d 1340 (11th Cir. 2002) 21

Virgili v. Gilbert, et. al.,
272 F.3d 391 (6th Cir. 2001) 15

Ward v. County of San Diego,
791 F.2d 1329 (9th Cir. 1986), *cert. denied, Duffy v. Ward*, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987) 10

Wilson v. Layne,
526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed. 2d 818 (1999) 12, 17

CONSTITUTIONAL PROVISIONS:

Fourth Amendment . . . . . *passim*
Fourteenth Amendment 2, 31

STATUTES:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 7
28 U.S.C. § 2101(c) 1
42 U.S.C. § 1983 . . . . . 2, 18

RULES

Sup. Ct. R. 10(1)(a) 1
Sup. Ct. R. 10(1)(c) 1

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case entered on April 20, 2010.

OPINIONS BELOW

The Per Curiam opinion of the Eleventh Circuit Court of Appeals whose review is sought is reproduced in the Appendix A at 1a to 17a. The Order of the United States District Court in which it Denied summary judgment to defendant officers on qualified immunity grounds, is unreported, and is reproduced in the Appendix to this Petition ("Appx. A") at 18a to 65a. The Order of the United States District Court in which it Granted summary judgment on Petitioners' remaining claims, is unreported, and is reproduced in the Appendix to this Petition at 66a to 70a.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court. The Per Curiam opinion of the Eleventh Circuit court of appeals was entered on April 20, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1). The present Petition for Writ of Certiorari is filed within Ninety (90) days of the Opinion of the court of appeals reversing the Order of the district court below, and is timely pursuant to 28 U.S.C. § 2101(c) and Rules 10(1)(a) & (c) of the Rules for the Supreme Court.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are *U.S. Const. amend. IV.* and *42 U.S.C. § 1983*.

1. The *Fourth Amendment to the United States Constitution*, incorporated to the States by the *Fourteenth Amendment*, provides:

> **"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."**

2. *42 U.S.C. § 1983* provides, in relevant part:

> **"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ..."**

STATEMENT OF THE CASE

I. Background Facts and Issues

This case arises from the unprovoked shooting and killing of an unarmed man, Lester Zachary ("Zachary"), on April 4, 2005 while standing on his front porch by Columbus Police Department ("CPD") officers, Joseph Coats ("Coats"), Sergeant Kenneth Hudson ("Hudson"), Sergeant Gregory Touchberry ("Touchberry") and Officer Gary Bolen ("Bolen"). At about 3:00 a.m. on April 4, 2005, Zachary, a 45 year old army veteran who was diagnosed with post traumatic stress disorder contacted the Veterans Administration ("VA") Dayton, Ohio 911 hotline to request help with dealing with nightmares he was having about children he may have killed during the war. He reported that the dreams had returned after one year of not having them. Zachary also requested that the VA not send police officers to his house and threatened to shoot them if they did. However, the VA contacted CPD and requested they go to Zachary's residence to render assistance. The CPD despatch relayed the information received from the VA 911 over the police radio, and advised all officers that Zachary was suicidal, homicidal, had weapons, and was to be approached with caution. About eight officers swarmed Zachary's residence and, surrounded the ranch style property where Zachary resided with his female acquaintance, Helen Stephens ("Stephens").

Also, during that early morning, Zachary's fourteen (14) year old daughter, who was visiting with him for the high school spring break weekend was asleep in

one of the rooms. When the police arrived Zachary refused to go outside out of his stated fear that he would be arrested. However, Zachary and Stephens maintained telephone dialogue with the CPD despatch, during which Zachary warned the CPD 911 despatch, "Look here, ma'am. You tell these guys in front of my door, I'm... going to start shooting. I'll start shooting..... get these guys out of my door, man...." However, Stephens assured the despatch supervisor, Ms. McDaniel ("McDaniel") that they did not possess or own any weapons, there were no guns anywhere in their house, and that Zachary was drunk and had neglected to take his mental health medication. McDaniel immediately despatched to the hearing of all officers that there were no guns in the house, and that it was a "psychiatric problem."

McDaniel then advised Zachary to look outside and observe the sea of blue lights outside his home, and pressed him to go outside and talk to the police to prove that he did not have harmful intentions towards them. She also announced to all officers that Stephens was going to open the door "for ya'll to come in," and; that Zachary had calmed down. Meanwhile, Hudson arrived at the scene and took command. McDaniel explained to Hudson that Stephen was going to open the front door and secure the dog so the officers could come in and talk to them. Stephens assured McDaniel that she did not feel threatened; that Zachary was not threatening her or "the baby;" and McDaniel told her that someone needed to go outside and convey that information to the police. At this time, Zachary and Stephens walked outside and stood on their front porch, but no officer agreed to go up to the porch and meet with them. Zachary then went back inside the house to continue to speak with the CPD despatch.

Thereafter, Zachary went in, to and from the house, at least three or four separate times with his hands up in the air and stood on his porch, and each time waved his both arms in the air and pulling his tee-shirt up and announcing, "I don't have a gun!!" and "look y'all I don't have no weapons." He also kept demanding for the officers to "get off my property, get off my property, ya'll get off my property" as he stood on the porch. Zachary did not make any threats at any officer. No officer present saw any weapon in his hands each time Zachary emerged from the house. No one observed him point any kind of object at the police, or make any threatening gestures, yell threatening or curse words, or observed Zachary approach the officers in a threatening manner. Most officers present agreed the situation was not a hostage incident or one that warranted the use of deadly force. Yet, the CPD made no effort to obtain a warrant to enter the house and arrest Zachary and, although, there was a 14 year old child inside the house, no officer went into the house after Zachary's shooting to check on her condition. Zachary's house was surrounded by eight officers and, he could not have fled or escaped.

When Zachary emerged with Stephens from the house the third time, Stephens left the porch and walked across their front lawn to the street curbside to speak with Hudson. Stephens again advised Hudson that there were no guns in the house; she did not feel threatened; that Zachary was not threatening her or "the baby;" that Zachary was drunk and failed to take his medicine but, had calmed down. After speaking with Hudson, Stephens returned to the porch, and they both went back into their house. However, before they retreated into the house this time, Zachary announced to the officers that as far as he was

concerned the matter was over with and that he was going to bed, and shut the door behind them.

Annoyed that Zachary went back into the house, the sergeants instructed Coats, a military-trained marksman, sharpshooter, and a member of CPD's initial team of officers to be trained on the use of beanbag munition, to position himself about 21 feet from the east side of the porch on the driveway, and to shoot Zachary with the beanbag rounds if he reemerged from the house. None of the officers warned Zachary that he would be shot if he failed to comply with any instructions of the police officers. Instead, Hudson yelled out Zachary's name loudly and, commanded him to come outside. When Zachary, in obedience to the police command came outside, Hudson and Touchberry ordered Coats to shoot Zachary. Coats shot Zachary twice with beanbag rounds, at close range (21 feet) and, with deadly force sufficient to shatter his spleen. Coats, deposed that he was aiming at Zachary's upper shoulder, but instead hit him once on his spleen area, and a second time on his left chest. Significantly, Coats deposed that they decided to shoot Zachary because they did not want him to go to bed and leave them outside. Two days later, Zachary died at a nearby hospital.

II. The District Court Decision

On April 3, 2007, Petitioners filed a Complaint in the district court against the officers and City of Columbus for multiple federal and state law claims which included unlawful use of excessive force and, for Bolen failing to properly train and supervise the offending officers on the appropriate use of deadly force. On December 2, 2008, the district court entered

an Order denying the City's and officers' summary judgment motion on Plaintiffs' excessive force claims based on qualified immunity. The district court held that "genuine issues of material fact exist as to whether Hudson, Coats and Touchberry had arguable probable cause to use deadly force against Zachary." With regard to officer Bolen, the district court held that "..... a jury could conclude that he trained officers to aim the beanbag ammunition at the center mass even when deadly force was not warranted because he told them to target the center mass at distances of twenty to forty feet but did not adequately warn them of the consequences of targeting the center mass from that distance." ***(Appx. B & C)***.

III. Decision of the Eleventh Circuit Court of Appeals

Under the authority of ***28 U.S.C. § 1292(b)***, Defendants petitioned the Eleventh Circuit Court of Appeals for leave to file an appeal of the district court's denial of qualified immunity protection to the officers and, the City of Columbus. By an Order entered February 23, 2009, the Eleventh Circuit granted the officers' petition for leave to appeal but denied the City of Columbus' similar petition for leave to appeal. On April 20, 2010, the Eleventh Circuit Court of Appeal entered an Order Reversing the district court's denial of summary judgment to the officers on qualified immunity grounds. ***(Appx. A)***.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Eleventh Circuit's April 20, 2010 opinion should be reviewed by this Court because it involves questions of great importance that has created much conflicting opinions among the circuits, as to the proper scope of analysis to determine when a right is "clearly established" in view of this Court's holding in ***Harlow* v. *Fitzgerald*, *457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)***. Erroneously, the Eleventh Circuit overruled the district court to make the appellate finding that use of beanbag munition did not constitute deadly force, and that Zachary caused his own fatal shooting by the officers because he was allegedly ".... ranting, raving, and yelling" at them to leave his premises, and that Zachary was believed to possess a loaded gun, despite plethora of district court factual findings to the contrary. See **(Appx. A at 47a)**.

Indeed, the Panel's opinion ignores this Court's well-established "totality of circumstances" precedent of ***Tennessee v. Garner*, *471 U.S. 1, 8-9 (1985)***, and its own precedent that shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others constituted an unreasonable search and seizure and clearly violated fourth amendment law. ***Lundgren v. McDaniel*, *814 F.2d 600, 603 (11th Cir. 1987)***.

Further, the Eleventh Circuit's opinion sidestepped this Court's important holding in ***Pearson v. Callahan*, *129 S.Ct. 808*, *172 L. Ed. 2d 565 (2009)***, that accused police officers were entitled to rely on the body of case law from three out of circuit federal

circuits and two state supreme courts, to find that the "consent-once-removed" doctrine was clearly established law even though the question had not been addressed by the deciding circuit. Thus, Petitioners respectfully submit that there are four reasons why this Court should grant their petition for writ of certiorari and review the Eleventh Circuit Court of Appeal's decision.

First, as the Eleventh Circuit and other circuits have recognized, there are distinct split of opinion among the circuit courts of appeal as to the nature and scope of precedents a Court must consider in determining whether a right is clearly established. Second, the ruling by the Eleventh Circuit conflicts with this Court's precedent authorizing Courts to examine the entire body of case law, including out of circuit cases, to determine whether a law is clearly established. Third, there is a distinct split of opinion between Eleventh Circuit and the Fifth, Sixth and Seventh Circuits with regard to reviewability of the factual findings of the district court, as to whether the shooting of beanbag munition rounds at a victim by police officers constitutes deployment of deadly force. A review of the Eleventh Circuit decision is appropriate to consider whether out of circuit decisions should be evaluated to clearly establish a right in light of ***Pearson v. Callahan***. Fourth, there is a conflict between the Eleventh Circuit and this Court's precedent, as well as the Sixth, Ninth, Tenth Circuit Courts of Appeal and, a district court, as to whether in the undisputed absence of exigent circumstances, ***Payton*** is violated when officers command a suspect to come outside his home under threat of force and, then shoot and arrest the suspect without any warning or a warrant.

I. THE CIRCUITS ARE SPLIT

In determining whether the "clearly established" requirement is met, there is an acknowledged split among the Circuits on whether out of circuit body of case law should be considered by Courts of Appeal. Initially, this Court did not clearly delineate what nature of precedents was necessary to constitute a "clearly established" right. ***See Ohio Civil Service Employees Association v. Seiter, 858 F.2d 1171, 1175 (6th Cir.1988)***. Thus, the number and nature of precedents necessary to "clearly establish" a right varies throughout other circuits, and sometimes even within a circuit. ***Cf. Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir.1986), cert. denied, Duffy v. Ward, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir.1985)*** (in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established); ***Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991)*** (a law enforcement officer cannot be held to a standard of conduct unsettled by the Supreme Court, 11th Circuit, or highest state courts in the circuit); ***Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988)*** (to be clearly established a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court). For some courts, the nature of the precedents required seemed to vary depending on the nature of the right asserted. ***See Ohio Civil Service, 858 F.2d at 1177***.

A. The Eleventh Circuit (In the Present Case) and the Fourth Circuit have held that in determining whether a constitutional right was Clearly Established at the time of the claimed violation, Courts need not look beyond the decisions of the Supreme Court of United States, their own court of appeals, and the highest court of the state in which the case arose.

In the Eleventh Circuit decision that petitioners ask this Court to review, the court opined that "As for the case law, 'we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances." ***(Appx. A at 9a)***. This position represents the narrowest view in the interpretation spectrum, and reaffirmed the Eleventh Circuit's long held view that it places little or no value on the opinions of other circuits in determining whether a right is clearly established. See, ***Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991)*** (a law enforcement officer cannot be held to a standard of conduct that is unsettled by the Supreme Court, 11th Circuit, or highest state courts in the circuits); ***Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990)*** (to decide a clearly established right, court looks to the law established by the Supreme Court, the courts of appeals, and the district courts).

The Fourth Circuit employed a similar interpretation in ***Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999)***, when it opined that "In determining whether a [constitutional] right was clearly established at the time of the claimed violation,

courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." Similarly, in ***Wilson v. Layne, 141 F.3d 111, 114 (4th Cir.1998) (en banc)*** the Fourth Circuit Court of Appeals held that "[A] law is 'clearly established' when 'the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.'" The Fourth and Eleventh Circuits conflict with other Federal circuits and represent the narrowest interpretation of the "clearly established" right.

B. In Conflict, the Ninth, Seventh and Third Circuits have held that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of the state courts, other circuits, and district courts, and even unpublished decisions of district courts may inform the circuit's qualified immunity analysis.

On the other end of the "clearly established" analytical spectrum, the Ninth Circuit Court of Appeals adopted a broad view that "[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." ***Malik v. Brown, 71 F.3d 724, 727 (9th Cir.1995)***. This circuit subsequently expanded its scope further and held that "[E]ven unpublished decisions of district courts may inform our

qualified immunity analysis." ***Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002).***

Likewise, the Seventh Circuit has held that

> **"When looking at closely analogous cases to determine if a right was clearly established at the time of the violation, we look first to controlling precedent on the issue from the Supreme Court and to precedent from this Circuit. In the absence of controlling precedent, we must broaden our survey to include all relevant case law in order to determine 'whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'"**

Estate of Escobedo v. Bender, No. 08-2365 (7th Cir. Apr. 5, 2010)[1], citing, Jacobs v. City of Chicago, 215 F.3d 758, 766 (7th Cir. 2000).

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[1] In Escobedo, the circuit court partly relied on the body of case law from other circuits to conclude that "Based on controlling precedent from this Circuit and the clear trend in the law from our sister circuits, the clearly established law as of July 19, 2005, established that the use of tear gas is unreasonable when: (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual threat; (3) when the individual is not holding hostages; (4) when the individual has not committed a crime and the officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police....." ***Estate of Escobedo v. Bender, Id. at pp. 24-25.***

In the Third Circuit, a district court held that "[I]n an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." ***Lattany v. Four Unknown U.S. Marshals, 845 F.Supp. 262 (E.D. Pa. 1994)***. Contrary to the Eleventh and Fourth Circuits, the clear thrust of the Ninth, Seventh and Third Circuits' "clearly established" law analysis is that the Courts ordinarily look at binding precedent of this Court, their respective circuits and state supreme courts, failing of which the courts turn to the decisional laws of other circuits. This Court must resolve these conflicts on this important issue.

C. The Sixth and Tenth Circuit Courts of Appeal have held that in order for the law to be clearly established, there must be a Supreme Court of United States or, its own Circuit decision on point, and in limited circumstances, on decisions of other circuits.

The Tenth Circuit takes a more balanced approach, by holding that although the action in question does not have to have been previously held unlawful, in the light of pre-existing law the unlawfulness must be apparent. "This ordinarily means that there must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other

courts must have found the law to be as the plaintiff maintains." ***Garramone v. Romo, 94 F.3d 1446, 1451 (10th Cir. 1996); Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir.1992).***

Similarly, the Sixth Circuit held that

> **"In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."**

Virgili v. Gilbert, et. al., 272 F.3d 391, 393 (6th Cir. 2001). In fact, a district court in the Sixth Circuit, relied exclusively on Second, Fourth and Eighth Circuit decisional law to hold that the law was sufficiently established at the time of correctional officer's unconstitutional strip search of prison employees that the Fourth Amendment of the Constitution imposed a reasonable suspicion standard that governs strip searches of prison employees, and that suspicion to strip search an employee must be articulable, particularized, and individualized. ***Pierce v. Ohio Dept. of Rehabilitation and Corr., 284 F.Supp.2d 811 (N.D. Ohio, 2003).***

Invariably, in conflict with the Sixth Circuit, the Eleventh Circuit's decision being challenged in this petition, opined that "California case cannot provide fair warning to the officers in Columbus, Georgia because again, in this circuit, only cases from the pertinent state supreme court, the United States Supreme Court or the Eleventh Circuit can clearly establish the law." Respectfully, the California case can, and should, provide fair warning to officers in Columbus, Georgia, in our federal judicial system, especially when Constitutional rights are implicated. Interestingly, the Eleventh Circuit contradictorily recognized as much when it relied on the same California case in 2005 to deny qualified immunity to officers when it held:

> **"However, viewing the facts in the light most favorable to Mercado, we can find no indication that he made any threatening moves toward the police. *See Deorle v. Rutherford,* 272 F.3d 1272, 1284-85 (9th Cir.2001) (denying officers qualified immunity after deploying a projectile bean bag and taking out the eye of a subject who was relatively cooperative and not a threat to the officers)..... *See Fernandez v. Cooper City,* 207 F.Supp.2d 1371, 1377 (S.D.Fla.2002).."**

Mercado v. City of Orlando, 407 F.3d 1152, 1157-58 (11th Cir., 2005). If the 11th Circuit could rely on ***Deorle*** case in 2005 to deny qualified immunity, one wonders why it is unable to do so in 2010 under similar circumstances. Nonetheless, the Eleventh Circuit's very narrow interpretation of the "clearly established" principle is contrary to this Court's

direction to courts to consider out of circuit cases in such analysis, and should be addressed and resolved by this Court.

II. THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT WITH REGARD TO THE SCOPE AND NATURE OF PRECEDENTS TO CONSIDER IN DETERMINING WHETHER A RIGHT OR LAW IS CLEARLY ESTABLISHED.

A. Supreme Court Precedent Directs Courts to Consider Out of Circuit Cases in Determining Clearly Established Law.

In ***Harlow v. Fitzgerald***, this Court held: "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Id. at 818.*** Initially, this Court did not clearly delineate what nature and scope of precedents were necessary to constitute a "clearly established" right. It simply held that the inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." ***Wilson v. Layne, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)***. However, this Court explained that the reasonableness of official conduct (search or seizure) must be evaluated in context, i.e., whether the totality of the circumstances justified a particular sort of action. ***Tennessee v. Garner, Id.***. A few years after the ***Harlow*** decision, this Court clarified that for the

purposes of qualified immunity analysis, "clearly established" means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)***. For about twenty years after the ***Anderson*** decision, Courts were still issuing conflicting opinions regarding the proper analysis of the nature and scope of the body of laws to be considered in determining when a right is clearly established; on the one hand, the Eleventh and Fourth Circuits took extremely narrow view and, would not consider out of circuit case law, while the Ninth, Seventh and Third Circuits adopted an expansive view, and take into account, not just their own circuit decisions, but also, out of circuit as well as unpublished opinions in their analysis of the "clearly established" right. Meanwhile, the Sixth and Tenth Circuits pursued a "middle-of-the-road" approach, and would consider out of circuit decisions in their analysis only in limited circumstances.

Subsequently, in ***Pearson v. Callahan, Id.***, this Court provided clear guidance on the appropriate body of case law to be considered in determining whether a right is "clearly established."[2] In reversing the Tenth

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[2] In ***Pearson v. Callahan, Id.***, the respondent arrestee sued police officers who conducted a warrantless search of his house incident to his arrest for the sale of drugs to an undercover informant whom he had voluntarily admitted to the premises. After the Utah Court of Appeals vacated the arrestee's conviction for possession and distribution of drugs, which he sold to an undercover informant he had voluntarily admitted into his house, he brought a ***42 U.S.C. § 1983*** damages action in federal court, alleging that the officers who supervised and conducted the

Circuit, this Court held that it was appropriate for the district court to rely on decisions of three (3) out of circuit federal courts of appeal, as well as two (2) out of state Supreme courts to conclude that the Plaintiff's advocated rights was not clearly established when the search and arrest incident occurred. Specifically, this Court held as follows:

> **"When the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, *e.g.*, *United States v. Diaz, 814 F.2d 454, 459 (CA7)*, cert. denied, *484 U.S. 857, 108 S. Ct. 166, 98 L. Ed. 2d 120 (1987)*; *United States v. Bramble, 103 F.3d 1475 (CA9 1996)*; *United States v. Pollard, 215 F.3d 643, 648-649 (CA6)*, cert. denied, *531 U.S. 999, 121 S. Ct. 498, 148 L. Ed. 2d 469 (2000)*; *State v. Henry, 133 N.J. 104, 627 A.2d 125 (1993)*; *State v. Johnston, 184 Wis. 2d 794, 518 N.W.2d 759 (1994)*. It had been accepted by every one of those courts. Moreover, the Seventh Circuit had**

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warrantless search of the premises that led to his arrest after the sale, had violated the ***Fourth Amendment***. The District Court granted summary judgment in favor of the officers. Noting that other courts [out of circuit] had adopted the "consent-once-removed" doctrine, the district court concluded that the officers were entitled to qualified immunity because they could reasonably have believed that the doctrine authorized their conduct. The Tenth Circuit Court of Appeals held that the officers were not entitled to qualified immunity.

> **approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul, 808 F.2d 645, 648 (1986).* The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon, 398 F.3d 802, 806-808,* cert. denied, *546 U.S. 977, 126 S. Ct. 548, 163 L. Ed. 2d 460 (2005),* and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries..... Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions."**

Pearson v. Callahan, 129 S.Ct. 808, 822-23, 172 L. Ed. 2d 565 (2009).

Thus, the Eleventh Circuit's practice of narrowly interpreting the "clearly established" right directly conflicts with and, flies in the face of this Court's foregoing holding that out of circuit cases should be considered and that officers are entitled to rely on existing lower court cases without facing personal liability for their actions, and not just on in-circuit decisions. By the same token, Petitioners may rely on similar cases to establish that a right was clearly established. Yet, the Eleventh Circuit has casually restricted the territorial scope of decisional case law that it will review when analyzing whether a right is "clearly established," to include only the Supreme

Court, 11th Circuit and Georgia Supreme Court decisions. See, ***Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002); McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir. 2007); Marsh v. Butler County, 268 F.3d 1014, 1032 (11th Cir. 2001) (en banc); Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991); Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990), Hamilton v. Cannon, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996).*** Such very narrow interpretation is greatly injurious to Plaintiffs trying to enforce their fourth amendment rights against government officials because, it severely limits the pool of available cases from which the Eleventh Circuit could adduce whether a right is clearly established, to the Plaintiff's ultimate disadvantage. Therefore, this Court's review of the Eleventh Circuit's decision hereof is imperative and necessary to bring uniformity among the circuits.

B. The Law was Clearly Established on April 4, 2005 that, shooting a Compliant, Unarmed Mentally Disturbed Suspected Felon who was neither Fleeing nor Resisting Arrest and, did not Threaten the Police Officers in any manner, was an unreasonable search and seizure and violated Fourth Amendment law.

In ***Garner***, it was held that "a police officer may not seize an unarmed, nondangerous suspect by shooting him dead." ***Garner, 471 U.S. at 11***. The district court hereof relied on the ***Garner*** principle to conclude that "a jury could conclude that a reasonable officer on the scene possessing the same facts as the defendant officers in this case would not have had a reasonable belief that deadly force was warranted under the circumstances." ***(Appx. B at 47a-48a)***. The

district court here, found that "Zachary was intoxicated and loud, but he did not directly threaten the officers, and the officers never saw a weapon in Zachary's hands or on his person during their twenty of so minutes on the scene before the shooting." ***(Appx. B at 48a)***. Although, the Eleventh Circuit's decision disagreed with the district court's foregoing factual finding, yet, it is clear that ***Harlow*** and ***Garner*** provided clearly established law in this case and, stood for the proposition that police officers were not permitted to shoot and kill an unarmed man who was not threatening the officers or others. Notwithstanding ***Harlow*** and ***Garner***, several out of circuit cases clearly established the above right in the context of beanbag deployment.[3] In reversing the court's grant of summary judgment to the officer in ***Deorle***, the Ninth Circuit held that:

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[3] In Deorle, on September 9, 1996, officers responded to a call which asserted that a mentally-disturbed suspect was creating a disturbance in his home. Like Zachary, Deorle had consumed alcohol along with prescribed medication, was suicidal, and his wife contacted 911.Rutherford, along with 13 other officers responded. Although, he was verbally abusive and initially refused to let the police into his home, Deorle was physically compliant and generally followed all of the officers' commands. Deorle was agitated, roamed on or about his property, and threatened to "kick Rutherford's ass." Armed with a 12 gauge shotgun loaded with "less-lethal" beanbag rounds, Rutherford positioned himself in a garden adjacent to Deorle's house. As Deorle walked towards him, Rutherford aimed the beanbag shotgun at Deorle's lower right rib area and fired from 30 feet away. Prior to shooting him, Rutherford did not order Deorle to halt or, warn Deorle that he was going to shoot him. The beanbag round struck Deorle on his face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull.

> **"Every police officer should know that it is objectively unreasonable to shoot–even with lead shot wrapped in a cloth case–an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone."**

Deorle v. Rutherford, 272 F.3d 1272, 1287 (9th Cir. 2001), cert. denied, 536 U.S. 958, 122 S.Ct. 2660, 153 L.Ed.2d 835 (2002). The 9th Circuit considered it significant that Rutherford and a host of other officers were at the scene for over half an hour before and had the opportunity to observe Deorle before Rutherford shot the emotionally disturbed Deorle implying he posed no threat to anyone; that Rutherford had a clear line of escape from the position he assumed; that he failed to warn Deorle that he was going to shoot him. ***Id. at 1283-1284***. All of the foregoing significant facts considered important by the Ninth Circuit Court in **Deorle** are present here; the district court made factual findings that:

> **"Zachary never made any threats directly to the officers, and he never threatened Stephens or anyone else in front of the officers. None of the eight officers on the scene saw a weapon in Zachary's hands or**

> **on his person. The officers knew that Zachary was a psychiatric case. Zachary repeatedly told the officers that he had no weapons, and he lifted his shirt to show them that there was no weapon in his waistband. Stephens told both 911 and the officers on the scene that she did not feel threatened, that Zachary did not have a gun, and that Zachary had calmed. Zachary came out onto the porch at least three times. Each time, Zachary went back into the house, but each time, he returned to the porch unarmed and telling officers that he was unarmed. Before he went into the house for the last time, Zachary told the officers he was going to bed. After that, Zachary complied with the officers' requests for him to come back outside, and Zachary was still unarmed."**

(Appx. A at 47a).

Invariably, just as Rutherford's behavior in **Deorle**, the police officers never warned Zachary that if he did not surrender, they were going to shoot him. **(Coats Depo. p. 177).** Importantly, Coats testified that the reason he was ordered to not let Zachary back into his house was because Zachary previously told them he was going to bed and, they weren't sure if he would come out again if they allowed him to get back in the house. Thus, it is clear that the reason that Zachary was shot was not because of any safety concerns about a child inside the house as claimed by the officers, but because they did not want him to go to bed and leave the officers outside. This is a question the jury should be allowed to resolve, and not the appeals court. Thus,

contrary to The Eleventh Circuit's conclusion, the police officers' conduct here were so egregious that a constitutional right was clearly violated. See, **Deorle, *Id. at 1286.***

Other Courts have also applied the ***Garner*** and ***Deorle*** principles in beanbag, sage launcher and police dog attack contexts. If the Eleventh Circuit had properly considered out of circuit cases, it would have observed that the law was clearly established contrary to its findings. ***See Omdahl v. Lindholm, 170 F.3d 730, 733 (7th Cir. 1999); Otero v. Woods, 316 F.Supp.2d 612 (S.D. Ohio 2004); Kuha v. City of Minnetonka, 365 F.3d 590, 597-98 (8th Cir.2004); Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 268-69 (4th Cir. 1991)***.[4] Here, Zachary was neither fleeing

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[4] ***See Omdahl v. Lindholm, Id. at 733*** ("Thus, determining whether Lindholm's and Stoffel's actions were objectively unreasonable requires us to resolve the factual dispute regarding the classification of the beanbag rounds as deadly force. Making such a determination is improper because it requires us to step beyond the jurisdictional limitations of this Court by resolving a material issue of fact."); ***Otero v. Woods, Id.*** ("A reasonable jury could find, based on the facts as presented by Plaintiff, that the use of wooden baton rounds here was objectively unreasonable and that Defendants Zoretic, Wood, and Curmode each played a significant role in this use of force and thus should be liable to Plaintiff under § 1983); ***Kuha v. City of Minnetonka, Id.*** at ***597-98*** (concluding "that a jury could properly find it objectively unreasonable to use a police dog trained in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender"), ***Vathekan v. Prince George's County, Id. at 175*** (holding that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone), ***Kopf v. Wing, Id. at 268-69*** (reversing summary judgment in favor of officer

nor resisting arrest, nor possessed any weapons, nor threatened the police officers in any manner. He was totally compliant and carried out all of the officers' commands including coming out of his house when ordered to do so at which time he was shot, and no verbal warning was given to Zachary before he was fatally shot. No doubt, it was clearly established under ***Deorle***, 11th Circuit's ***Lundgren*** and, other out of circuit decisions before April 4, 2005, that officers were required to warn potential victims before shooting them, and that shooting an unarmed, non-fleeing suspected felon dead to just arrest him violated Fourth Amendment law.

III. THE ELEVENTH CIRCUIT'S DECISION IS INTERNALLY INCONSISTENT, FAILS TO FOLLOW ITS OWN PRECEDENT AND CONFLICTS WITH THE FIFTH, SIXTH, AND SEVENTH CIRCUITS' DECISIONS, WHICH HOLD THAT THE QUESTION OF WHETHER THE BEANBAG ROUND CONSTITUTES DEADLY FORCE IS A FACTUAL FINDING RESERVED TO THE DISTRICT COURT AND, THE CIRCUIT COURTS ARE WITHOUT JURISDICTION TO REVIEW TRIAL COURT FACTUAL FINDINGS.

A. The Eleventh Circuit Panel's Decision is Either Internally Inconsistent or Fails to

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defendants where there existed a factual dispute regarding whether a verbal warning was given).

Present Grounds for Reversal and, Conflicts with its Own Precedent.

The Eleventh Circuit's decision conflicts with its own prior decision in ***Lundgren, id.*** and, an in-circuit district court decision of ***Hernandez v. City of Miami, 302 F. Supp. 2d 1373 (S.D.Fla. Feb. 13, 2004), affirmed without opinion, 204 U.S. App. LEXIS 28318 (11th Cir. Oct. 19, 2004),*** which held that officers were not permitted to shoot dead an unarmed, non-threatening suspected felon. In ***Lundgren***, in affirming the denial of qualified immunity to the errant officers the Eleventh Circuit took note of the factual disputes in the case and declared: " We hold that shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others was–even in July, 1983– an unreasonable seizure and clearly violate fourth amendment law." ***Id. at 603***. Thus, it was clearly established in Eleventh Circuit as far back as 1983 that shooting one who was not threatening an officer, fleeing, or engaging in any threatening behavior constituted unreasonable seizure and violated the 4th Amendment law. Yet, in the instant case, the same Eleventh Circuit employed tortured logic and, went to great lengths to approve the police officers' similar conduct in shooting the unarmed, non-threatening Zachary. Likewise, in ***Hernandez v. City of Miami, Id.***, in finding that the officer was not entitled to qualified immunity, a district court found that the suspect had dropped his weapon and was running away unarmed, any perceived threat had dissipated, the officer failed to give any warning prior to firing his weapon, and therefore, the officer had no probable cause, or arguable probable cause to use deadly force. ***Id. at 1379***.

No doubt, ***Lundgren*** and ***Hernandez*** cases make it absolutely clear that the law was clearly established in the 11th Circuit, pre-April 4, 2005, that it was a 4th amendment violation, and excessive force to shoot someone that was in similar position as Zachary in this case. Respectfully, ***Lundgren*** and ***Hernandez*** are akin to the case instanter, and the 11th Circuit sidestepped its own precedent to conclude otherwise. In fact, the Eleventh Circuit inexplicably contradicted itself when in its attempt to distinguish ***Deorle*** from the case instanter, ended up pointing out the factual similarities between the two cases. First, the 11th Circuit decision held that "Despite factual similarities, the California case cannot provide fair warning to the officers in Columbus, Georgia....," but then the circuit court turned around in footnote 3 to state that "The ***[Deorle]*** case is also factually distinguishable," and went on to identify what it considered to be differences, which were in fact similarities, between the two cases, as follows; contrary to the Eleventh Circuit's statements, the victims in both cases were shot with beanbag guns; both men were psychologically troubled; both men had been acting erratically. **(Appx. A at 11a).**

Also, the 11th Circuit surprisingly concluded that the officers in the instant case faced substantially greater threat than the officers in ***Deorle***, because, Mr. Deorle had been holding a hatchet, a crossbow, and a can but discarded the weapons at the officers request, and yet, Zachary did not have any weapon of any kind, whatsoever, at any time throughout the course of the standoff with the police officers. Respectfully, these 11th Circuit appellate "factual" findings are exact opposite of the district court's factual findings in this case. **(Appx. B at 28a)**. Indeed,

it is rather difficult to see how an unarmed man presented more threat to the officers than, another who was armed with multiple weapons but discarded them upon the officers' request. This Court must intervene to correct the injustice of the Eleventh Circuit's remarkably charitable disposition towards these "law enforcement officers who used deadly force against an unarmed man under dubious circumstances," as concluded by the district court in this case. **(Appx. C at 68a-69a)**.

B. The Eleventh Circuit Decision Exceeded Its Jurisdiction and Improperly Usurped the District Court's Factual Finding Role, and Conflicts with the Fifth, Sixth, and Seventh Circuits.

The Eleventh Circuit's opinion, if read literally, means nothing more than that the district court made incorrect factual findings that Zachary was a mentally disturbed man, did not present any threat of harm to the officers, was compliant, did not possess any weapons, pulled up his shirt to show the officers that he did not possess any weapons, did not refuse to obey any instructions of the officers, held up his arms in submission to the officers and, that any previous threats to shoot at the officers to the 911 operator had dissipated by the time the officers arrived at Zachary's home and, that Zachary had calmed. Consequently, the Eleventh Circuit improperly made the factual findings that beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and that "[T]he case law from the relevant jurisdictions teaches us nothing about safe distances for shooting a beanbag gun," and thereby, granted qualified

immunity to the officers. In so holding, the 11th Circuit improperly exceeded its interlocutory jurisdiction which was limited, with regard to qualified immunity, to consideration of only questions of law, and not to make its own factual findings. The Eleventh Circuit's foregoing decision directly conflicts with the Fifth, Sixth, and Seventh Circuits.

In the Fifth Circuit, it is the law that whether a particular use of force is "deadly force" is a question of fact, not one of law. See, ***Meadours v. Ermel, 483 F.3d 417 (5th Cir. 2007).*** In denying jurisdiction to review the officers' appeal of denial of qualified immunity by the district court in ***Meadours*** , the Fifth Circuit held:

> **"In sum, the district court found that issues of fact exist. The district court found that both sides presented evidence to support their version of events and thus, the issues of fact were genuine. While we lack jurisdiction to review that finding, we may review the district court's determination that the factual issues are material. The question of when and where Meadours was shot is integral to determining whether the officers' actions were reasonable, and consequently, we conclude that the dispute is material. Because genuine issues of material fact exist, summary judgment is not appropriate and we remand for a trial on the merits."**

Id. at 424. Similarly, in ***Gutierrez v. City of San Antonio, 139 F.3d 441, 446 (5th Cir. 1998)***, the

Plaintiff brought suit against the police officers, for allegedly depriving the Plaintiff of his rights under the Fourth and Fourteenth Amendments by hog-tying him. The officers sought interlocutory appeal seeking dismissal or summary judgment based on qualified immunity. The Fifth Circuit denied jurisdiction and held "[B]ecause we conclude that material disputes of fact prevent us from determining the objective reasonableness of the officers' conduct, we dismiss their appeal of the Fourth Amendment claim for lack of jurisdiction." ***Id.*** See also, ***Flores v. City of Palacios, 381 F.3d 391, 394 (5th Cir. 2004)*** (A district court's finding of fact cannot be reviewed at the qualified immunity stage); ***Hale v. Townley, 45 F.3d 914, 918 (5th Cir.1995)***; ***Naylor v. State of La., Dep't of Corrections, 123 F.3d 855, 857 (5th Cir.1997).***

Likewise, in the Sixth Circuit Court of Appeals, the Court opined as follows:

> **"It is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force..... In this case, however, the jury becomes the final arbiter of defendant's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury."**

Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994). Thus, the court denied jurisdiction and left the factual findings in tact for the jury's determination at trial. Here, the officers argued, and the Eleventh Circuit agreed that they shot Zachary because they did not want him to go back into his home and harm his

daughter. Yet, officer Coats deposed to a different contradictory reason, while Stephens repeatedly advised the officers that she did not feel threatened, that the "baby" was fine and that Zachary had calmed. The Eleventh Circuit should have denied jurisdiction and allowed the jury to decide whose version of the facts to believe.

Also, the 7th Circuit held that whether shooting an individual with beanbags constitutes deadly force is a question of fact that an appeals court may not review. Thus, in ***Omdahl v. Lindholm, Id. at 733-734,*** the Seventh Circuit held that:

> **"The existence of a factual dispute prevents us from resolving this issue. Lindholm and Stoffel ask this Court to reverse the district court's denial of their motion for summary judgment with regard to their defense of qualified immunity. Reaching such a conclusion would require us to decide a material issue of fact--whether bean bag rounds constitute deadly force. We do not have the jurisdictional authority to make such a decision. It is for the trial court to resolve issues of fact, not an appellate court. Simply stated, we do not have jurisdiction to consider the merits of this interlocutory appeal."**"

Based on the foregoing, it is clear that the 11th Eleventh Circuit's appellate findings are in error and, its decision that deployment of the beanbag rounds was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of

a Taser gun," conflicts with the Fifth, Sixth and Seventh Circuits which hold that such question is a matter for the jury. A writ of Certiorari should be granted to address these conflicts between the circuits on this very important issue.

IV. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT IN *PAYTON* AND, THE SIXTH, NINTH, TENTH CIRCUITS AND A DISTRICT COURT AS REGARDS WHETHER THE FOURTH AMENDMENT LAW AGAINST WARRANTLESS ARRESTS/SEIZURES IS VIOLATED WHEN, OFFICERS COERCE A SUSPECT TO COME OUTSIDE HIS HOME UNDER THREAT OF IMMEDIATE FORCE, ONLY TO SHOOT AND ARREST THE SUSPECT WITHOUT ANY WARNING AND WITHOUT A WARRANT WHEN THE SUSPECT STEPS OUTSIDE ONTO HIS FRONT PORCH IN OBEDIENCE TO THE OFFICER'S COMMAND, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES.

It is well settled by this Court that unless exigent circumstances are present, the threshold to the entrance of the home "may not reasonably be crossed without a warrant." ***Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 369 (1980).*** Two "specifically established and well-delineated exceptions" are warrantless searches made pursuant to consent or under exigent circumstances. ***Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).*** Notwithstanding, and contrary to the Eleventh Circuit's decision hereof

which ratified the officers' warrantless shooting and arrest of Zachary after being coerced to come outside his home, the Sixth, Ninth and Tenth Circuits subscribe to a conflicting holding that "***Payton*** is also violated where there is such a show of force that a defendant comes out of a home under coercion and submits to being taken in custody." See, ***United States v. Maez, 872 F.2d 1444, 1451 (10th Cir. 1989), citing, United States v. Al-Azzawy, 784 F.2d 890, 893 and n.1 (9th Cir. 1985), cert. denied, 476 U.S. 1144, 106 S. Ct.2255, 90 L. Ed. 2d 700 (1986); United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984), cert. denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490; United States v. Edmondson,791 F.2d 1512, 1514-15 (11th Cir. 1986)***. "[T]he important point is that in cases of physical intrusion, or coercion to leave the home....the privacy of the home is effectively invaded." ***Maez, Id.***

In both ***Al-Azzawy*** **and** ***Morgan***, the Sixth and Ninth Circuits reasoned that where the police surrounded the defendants' homes and requested their exit by bullhorn, then in such circumstances, ***Payton*** was violated. ***Al-Azzawy, Id. at 893; United States v. Morgan, Id. at 1166.*** In ***Morgan***, the Court declared:

> **"[A]lthough, there was no direct police entry into Morgan's home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan.....Thus, the warrantless arrest of Morgan, as he stood within the door of a private home, after emerging in response to coercive police conduct, violated Morgan's fourth amendment**

> **rights. Id. at 1166. A contrary rule would undermine the constitutional precepts emphasized in *Payton*."**

Morgan, Id. at 1166-67, citing, United States v. McCool, 526 F. Supp. 1206, 1209 (M.D. Tenn. 1981). Here, Zachary's home was surrounded by about 8 armed officers, with their blue lights flashing, search lights beamed on the house, and 911 instructed Zachary to go outside and assure the police that he was not armed. The only reason Zachary agreed to go outside was because he felt coerced to do so by 911 and show of force by CPD officers, because he believed he would be arrested if he went outside. After Stephens returned to the porch from speaking with Hudson, Zachary told Hudson and other officers that "this is over with," and that he was "going to bed," and closed the door behind him. Hudson then yelled Zachary's name and ordered him to come outside, and when he stepped out to his front porch, he was shot by Coats without any warning or warrant.

The grant of this petition for certiorari is necessary to resolve the conflict between the Eleventh and other circuits as to whether ***Payton*** is violated when officers command a suspect to come outside his home under threat of force and, then to shoot and arrest the suspect without a warrant where no exigent circumstances exist.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be Granted.

Respectfully submitted,

BOBBY C. ANIEKWU
Georgia State Bar No. 019840
Counsel of Record
BOBBY C. ANIEKWU & ASSOCIATES
127 Peachtree Street, N.E.
Suite 410 - The Candler Building
Atlanta, GA 30303
Bobby.Aniekwu@att.net
(404) 885-1717

Attorney for Petitioners